IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. [redacted] 76-599

JOELLE FISHMAN, PETER GAGYI,
GUS HALL and JARVIS TYNER,
Petitioners,

v.

GLORIA SCHAFFER, in her capacity as Secretary of the State of the State of Connecticut and EVELYN GOODWIN, in her capacity as Town Clerk of the Town of Litchfield, Connecticut,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT SECRETARY OF THE STATE OF CONNECTICUT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should not a petition for writ of certiorari be denied where the District Court had found that the plaintiffs had unjustifiably delayed in bringing an elections suit so as to prejudice the State's vital interest in the authenticity of petition signatures?

STATEMENT OF THE CASE

On July 2, 1976, plaintiffs-petitioners,[1] hereinafter referred to as the petitioners, brought suit in United States District Court for the District of Connecticut challenging the constitutionality of a portion of this state's election laws. Petitioners' attack was aimed at only those sections of 9-453(a) et seq. which required the circulators of nominating petition signature pages to appear, in person, before the town clerk of the signer of the petition page and swear, in accordance with Section 9-453(j), Conn. Gen. Stat., that:

> ". . . each person whose name appears on such page signed the same in person in the presence of such circulator and that either the circulator knows each such signer or that the signer satisfactorily identified himself to the circulator."

The case was advanced on the docket and was heard on August 4, 1976 by a three-judge District Court. Argument was treated as one on the merits based on the cross motions for summary judgment.

On August 19, 1976, the Court issued its decision. It recognized that Connecticut has "one of the least demanding schemes for enabling potential candidates to gain a place on the ballot." (Petitioners' Appendix, A.3) The Court, however, did express serious concern for the petitioners' narrow claim as to the filing requirement, but found it unnecessary to rule on the merits. Instead, based upon affidavits and official documents from the Secretary of the State's office, it found that the petitioners had delayed unjustifiably in bringing this suit and were therefore barred by the equitable doctrine of *laches*.

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[1]Plaintiffs Fishman and Gagyi were petition circulators for plaintiffs Hall and Tyner, who were the Presidential and Vice-Presidential candidates of the Communist Party in the 1976 and 1972 presidential elections.

An appeal was taken from this decision to the United States Court of Appeals for the Second Circuit, wherein petitioners sought, (1) an expedited appeal and (2) an injunction pendng appeal. The injunctive relief was denied but an expedited hearing on the merits was ordered. Argument was heard on September 24, 1976 at which time the judgment of the District Court was affirmed unanimously.

Petitioners then applied for an injunction pending appeal to Mr. Justice Marshall, Circuit Justice. In a written decision dated October 1, 1976, Mr. Justice Marshall denied petitioners' application for injunctive relief. (A. pp. 3a-8a).[2] A re-application for injunctive relief was then presented to Mr. Justice Stewart. It was denied on October 4, 1976, without opinion.

ARGUMENT

A.

THE EQUITABLE DOCTRINE OF *LACHES* WAS PROPERLY INVOKED BY THE DISTRICT COURT.

A review of the long standing principles governing *laches*, when viewed in light of the facts surrounding this litigation leads to one conclusion: the District Court exercised sound discretion by invoking the equitable doctrine of *laches* to bar petitioners from pursuing their remedies.

Laches is an equitable doctrine based on the twofold notion of (1) an unreasonable delay of a party in pursuing rights that were known or should have been known, and (2) prejudice resulting from the delay. *Southern Pacific Railway Co.* v. *Bogert*, 250 U.S. 483, 488-490 (1918); *Johnston* v. *Standard Mining Co.*, 148 U.S. 360, 370 (1893). Further, the

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[2]Unless otherwise indicated, these references refer to the Appendix of Respondent, Gloria Schaffer.

public interest, intervening equities of third parties and the rule of clean hands may all operate to raise the bar of *laches* against a dilatory litigant. *Landell* v. *Northern Pacific Railway Co.*, 122 F.Supp. 253 (D.C. D.C. 1954), *aff'd.*, 223 F.2d 316 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 844, *reh. denied*, 350 U.S. 905 (1955).

1. Lack of Due Diligence.

The evidence before the District Court on this issue was compelling. The petitioners obtained the nominating petition forms on February 20, 1976. (Resp. Affidavit of September 9, 1976, filed in Court of Appeals, ¶ 13; Resp. Affidavit of August 2, 1976, filed in Dist. Ct., ¶ 3.) The forms indicated the existence of the certification requirement now challenged. In addition, instructions outlining the certification requirement and containing copies of the statutes now attacked were also provided that date. (Resp. Affidavit of September 9, 1976, ¶ 13.) Furthermore, the consent of the candidacy for Gus Hall, the Communist Party presidential candidate, was signed as early as January 21, 1976, prior to the alleged date of his nomination on February 18, 1976. (See consent form attached to Resp. Affidavit of August 2, 1976.) Petition forms could have been obtained as early as November 6, 1975. (Resp. Affidavit of August 2, 1976, ¶ 4.)

In addition, the Communist Party had unsuccessfully sought to qualify as a petitioning party in 1972, and thus the party organizers were certainly on notice as to the petition nominating procedure in Connecticut which is the same now as it was then. It should require little, if any, citation of authority for the proposition that the Communist Party itself could have instituted suit prior to the alleged date of its

actual nominations.[20] It is further noted that petitioner Fishman[3] qualified as a petitioning party candidate for Congress in 1974, under the same circulation and certification requirements. (Resp. Affidavit of September 9, 1976, ¶¶ 11 and 12.) Suffice it to say that the requirements of the present statutes did not come to the petitioners as a bolt from the blue. The petitioners claimed that they had waited until June of 1976 before thinking about suit because they had first hoped to obtain all the necessary signatures from the larger cities in Connecticut. First, it is noted that when specifically asked for the reasons for the delay by both Judge Blumenfeld and Judge Newman in the District Court, they did not offer this as an excuse. Furthermore, they did not provide any affidavit or other written claim to this effect prior to the issuance of the Memorandum of Decision of the lower Court. It was only in their motion for a new trial that this representation was first made.

The petitioners' failure to seek relief in a timely manner can only be attributed to lack of due diligence, to say the very least. In effect, what we are now being told is that the petitioners decided to take a chance and gamble that the necessary signatures could be obtained under existing procedures. Only when the election grew near and the petitioners realized that they might well be unsuccessful in their petition campaign did they belatedly turn to the Court for the extraordinary relief requested.

It is important to note that the District Court's finding in this respect is fully supported by the case law which we maintain would make the present petition bordering on the frivolous. In *Socialist Labor Party* v. *Rhodes*, 393 U.S. 23 (1968),

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[20]See *infra*, pp. 11-13.

[3]At the time this suit was brought, plaintiff Fishman was executive secretary of the Communist Party in Connecticut. (Petitioners' Brief, p. 3).

a companion case to *Williams* v. *Rhodes*, 393 U.S. 23 (1968),[4] the Supreme Court denied relief to the Socialist Labor Party on the following grounds:

> ". . . At that hearing Ohio represented to Mr. Justice Stewart that the Independent Party's name could be placed on the ballot without disrupting the state election, but if there was a long delay, the situation would be different. It was not until several days after that hearing was concluded and after Mr. Justice Stewart had issued his order staying the judgment against the Independent Party that the Socialist Labor Party asked for similar relief. The State objected on the ground that at that time it was impossible to grant the relief to the Socialist Labor Party without disrupting the process of its elections; accordingly, Mr. Justice Stewart denied it relief, and the State now repeats its statement that relief cannot be granted without serious disruption of election process. *Certainly at this late date it would be extremely difficult, if not impossible, for Ohio to provide still another set of ballots. Moreover, the confusion that would attend such a last-minute change poses a risk of interference with the rights of other Ohio citizens, for example, absentee voters. . . .*" (Emphasis added.)
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> 393 U.S. at 34-35.

[4]Throughout the course of this litigation petitioners have repeatedly and mistakenly placed reliance on *Williams* v. *Rhodes, supra,* in support of their claims for extraordinary relief. Most conspicuously, however, they have failed to address themselves to *Socialist Labor Party* v. *Rhodes, supra,* which is more closely in point. Two observations need be made concerning petitioners' application of *Williams,* (Petitioners' Brief, p. 9). First, in that case the questions of authenticity of signatures and significant modicum of support were not in issue. The Court apparently was satisfied that the state's interest in those regards were sufficiently protected, in light of the facts surrounding that case. Secondly, the State of Ohio admitted that Mr. Wallace could be placed on the ballot without disrupting the entire election process. The evidence in the present case, however, was exactly to the contrary on both these points.

This decision was followed in *Sullivan* v. *Grasso,* 292 F.Supp. 411 (D. Conn. 1968), a case involving a challenge to the Connecticut write-in vote laws. Judge Smith in dismissing the Complaint noted that the action came "at the eleventh hour, after failure to take advantage of the petition procedures, . . ." 292 F.Supp. at 413.

It is also noted that Chief Judge Clarie of the U.S. District Court for Connecticut observed in his Ruling denying a motion for preliminary injunction in another elections case:

> ". . . The four and one-half months which have elapsed between the approval and filing of the amended party rules and the filing of this action may support the equitable defense of laches, *cf. Gillespie & Co.* v. *Weyerhaeuser Co.*, slip op. at 2871 (2d Cir. April 1, 1976). . . ."
>
> *Armstrong, et al* v. *Schaffer, et als, Ruling On Motion For Preliminary Injunction,* Civ. No. H 76-136, D. Conn., May 3, 1976.

Thus, it was unreasonable to expect that the courts would undertake a drastic revision of the Connecticut election laws, particularly in light of the United States Supreme Court's admonition in *Socialist Labor Party* v. *Rhodes, supra.*

2. Resulting Prejudice.

We now turn to the second element involved in *laches,* resulting prejudice and injury. One essential interest of the State, considered by the District Court, was the requirement that petitioning parties demonstrate a minimum level of support before being placed on the general ballot. More specifically, there was also an important interest in ensuring that this support be shown in an honest manner, free from fraud. As the Supreme Court has noted:

> "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot — the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."
>
> *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971).

The District Court was made well aware by both brief and oral argument that the Connecticut Legislature had inserted the certification requirement involved to prevent recurrence of demonstrated abuses and irregularities in the circulation of nominating petitions. Connecticut General Assembly 1957 House Proceedings, Volume 7, Part 4, pp. 2313-14; Joint Standing Committee Hearings, Connecticut General Assembly 1957, p. 111.

It was apparent to the Court below that an effective and administratively feasible substitute remedy to protect these interests could not be devised in time for this year's elections due to "the unexplained and unjustifiable delay" on the petitioners' part. The statutory deadline for submission of nominating petitions to the Town Clerks was August 30, 1976 pursuant to Section 9-453i, Conn. Gen. Stat. The Complaint, however, was not filed in the District Court until July 2, 1976. The hearing before the three-judge District Court was held on an expedited basis on August 4, 1976. The Decision was filed on August 19, 1976.

It is noted that the proposals of the petitioners for delivery of the petitions to the Town Clerks would evidently have dispensed with the requirement for personal certification. The public would then have been exposed to the problem of alterations, subsequent to the notarization but before delivery, which was specifically why the present provision was enacted. The other proposal of the petitioners for delivery of the petitions to the Secretary of the State who would then have assumed the duty of distribution would have imposed severe administrative burdens on that office.[5] These valid administrative considerations on the part of the State of Connecticut were most properly considered by the District Court in this case. One of the leading decisions on this point is *Marston* v. *Lewis*, 410 U.S. 679 (1973). The Court there upheld a 50-day durational residency requirement of the State of Arizona for non-presidential elections. This was notwithstanding the Court's prior ruling in respect to 30 days in the case of *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

This decision was followed in *Burns* v. *Fortson*, 410 U.S. 686 (1973). The Court upheld a similar 50-day prior registration requirement contained in the Georgia Election Code, stating:

> "The State offered extensive evidence to establish 'the need for a 50-day registration cut-off point, given the vagaries and numerous requirements of the Georgia election laws.' Plaintiffs introduced no evidence. On the basis

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[5]The correctness of the District Court's decision on this issue is reflected in an affidavit submitted in support of respondents' brief to the Court of Appeals, wherein Robert J. Gallivan, Town and City Clerk of the City of Hartford, Connecticut, detailed the substantial number of hours and individuals needed for just receiving petitions, counting the number of signatures as well as pages and providing receipts for even a relatively small number of petition pages. This burden would probably have devolved upon the Secretary of the State, only to have been magnified on a state wide basis, had the plaintiffs prevailed.

Further, by affidavit dated August 9, 1976 submitted to the District Court in support of respondent's Motion for Summary Judgment, Henry S. Cohn, Elections Attorney and Director of the Elections Division of the Secretary of the State's Office testified that in the successful petition effort by the George Wallace Party in 1974 at least one thousand, seven hundred and thirty (1730) nominating petition signature pages of that party alone were submitted to his office by the town clerks of at least one hundred and fifteen (115) towns preceding the general election of 1974. All these pages would have had to have been initially processed, receipted for and then distributed by the Secretary of the State without any prior administrative preparation according to the plaintiffs' demands.

of the record before it, the District Court concluded that the State had demonstrated 'that the 50-day period is necessary to promote . . . the orderly, accurate, and efficient administration of state and local elections, free from fraud.' (Footnote omitted.) Although the 50-day registration period approaches the outer constitutional limits in this area, we affirm the judgment of the District Court. What was said today in Marston v. Lewis, 410 U.S. 679, at 681, 93 S.Ct 1211, at 1213, 35 L.Ed. 2d 627, is applicable here."

Id. at 687-688.

See also: American Party of Texas v. *White*, 415 U.S. 767 (1974), n. 18 at 788.

Furthermore, this Court ruled in *Reynolds* v. *Sims*, 377 U.S. 533 (1964):

"[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by MR. JUSTICE DOUGLAS, concurring in Baker v. Carr, 'any relief accorded can be

fashioned in the light of well-known principles of equity.'"

Id. at 585.

See also Burford v. *Sun Oil Co.*, 319 U.S. 315, 317-318 (1943).

In view of these well-established principles and the substantial evidence before the District Court, that Court was more than justified in concluding that it was too late, as a practical matter to afford relief and still protect the legitimate interests of the State of Connecticut in efficient administration and prevention of fraud.[6]

B.

RELATED EQUITABLE CONSIDERATIONS FULLY SUPPORT THE DISTRICT COURT'S DETERMINATION.

Petitioners, in their brief, advance a number of other theories which, they claim, demonstrate the manner in which the District Court misapplied the *laches* doctrine.

First, petitioners argue, the requirements of ripeness, standing and case or controversy were lacking until February 20, 1976, when the nominating petition pages were taken out. (Petition, p. 8.) As to the "ripeness" allegation, petitioners cite no authority for this proposition. In fact, as previously noted, given the history of petitioners' efforts since 1972 to gain

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[6]It is noted there were at least three (3) other state wide petitioning parties at the time of the District Court's decision. In the event that the District Court had issued an injunction, these other parties might well have demanded the same relief on the basis of *stare decisis* and thus the severe administrative burdens outlined would have been multiplied.

ballot access under this same statutory scheme, the facts compel an entirely different conclusion.

Concerning the issues of standing and case or controversy, petitioners cite a number of cases which can be easily distinguished. By way of example, petitioners cite *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583 (1972) in support of their case or controversy argument. In that case, however, the Ohio legislature extensively revised the statutes being litigated, rendering the appeal moot. A loyalty oath requirement, with which the appellant Socialist Labor Party had complied, went untouched by the revision. Examining that portion of the statute, the Court noted that the pleadings of the appellant failed,

> ". . . to allege that the requirement has in any way affected their speech or conduct, or that executing the oath would impair the exercise of any right that they have as a political party or as members of a political party."
>
> *Id.* at 587.

Since appellants did not allege and could not show any personal harm or injury, the Court refused to pass on the legal sufficiency of the loyalty oath requirement since, "the law's future effect remains wholly speculative." *Id.* at 589.

Even assuming *arguendo* that February 20, 1976 was the magical date, one other point should be noted. At the time this matter was presented to the District Court, petitioners neither briefed nor orally argued deficiencies of standing, case or controversy or ripeness as reasons for the long delay in bringing this action. Indeed, Justice Marshall, in his decision denying petitioners' request for injunctive relief, specifically noted that petitioners could have instituted suit earlier:

"In addition to these distinctions on the merits, there

are several additional factors militating against the extraordinary relief sought. First, the plaintiffs delayed unnecessarily in commencing this suit. The statute is not a new enactment and plaintiffs have, in fact, utilized it before. In 1972, the Communist Party unsuccessfully circulated petitions for presidential electors. And in 1974, Joelle Fishman, one of the plaintiffs-electors in this suit, successfully qualified as a petitioning candidate for Congress. *Thus, plaintiffs were sufficiently familiar with the statute's requirements and could have sued earlier.* (Emphasis added.)

(A. 8a).

Petitioners next argue that *laches* is an affirmative defense, and as such must be pleaded and proven by the party asserting it. In response to petitioners' Complaint of July 2, 1976, this respondent filed an answer including defenses under Rule 12(b), Federal Rules of Civil Procedure. Included therein was a defense that "The Complaint failed to state a claim upon which relief can be granted." In support of that defense, respondent, by way of both written brief and oral argument vigorously advanced the issue of *laches* before the District Court. At no point was an objection raised that this issue was improperly brought before the Court. Petitioners have, therefore, waived any objection that this defense was not properly pleaded. *Joyce* v. *L. P. Steuart, Inc.*, 227 F.2d 407 (D.C. Cir. 1955). Petitioners' implication that no facts were produced to support a defense of *laches* (Petition, p. 4) is untrue. Affidavits submitted to the District Court in support of respondent's Motion for Summary Judgment clearly set forth facts, which gave the District Court a substantial basis for its determination. In addition, the District Court judicially noticed that due to the imminence of the election, it would have been impossible to devise a remedy in time that would safeguard the legitimate interests of the state. As Justice

Marshall noted in his decision denying petitioners' request for injunctive relief:

> "The District Court, while sympathetic to this claim, did not rule on the merits, since it found plaintiffs' suit barred by laches. It noted that plaintiffs had tried and failed to qualify for a position on the ballot in a previous election. They were familiar with the statute and could have brought suit earlier. The delay meant that the legislature could not consider alternative filing requirements; instead, relief, if warranted, would have to be the drastic remedy of putting the candidates on the ballot, leaving the State with no protection of its interest in authenticity. Accordingly, the District Court dismissed the action. . . ."
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>
> (A. 5a).

Further, it is a long-standing and well-recognized principle that even where the issue of *laches* is not specifically pleaded as such, courts of equity will withhold relief from those who have failed to pursue their rights within a reasonable length of time. *Willard* v. *Wood*, 162 U.S. 502 (1896).[7]

Finally, petitioners state that

> "There is authority for the proposition that in a civil rights act case the District Court lacks discretion to deny relief where it finds the plaintiff to have established a right at trial, and relief is necessary to implement that right."

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[7]See generally, 2A *Moore's Federal Practice*, ¶ 12.09[2] n. 17 at 2295-6 (1975); *Latta, et al* v. *Western Inv. Co., et al*, 173 F.2d 99 (9th Cir. 1949), *cert. denied* 337 U.S. 940 (1949); *Sidebotham* v. *Robison*, 216 F.2d 816 (9th Cir. 1954) (*laches* need not be pleaded as affirmative defense where defect apparent on face of Complaint). *Cf. also Panhandle Eastern Piping Co.* v. *Parish*, 168 F.2d 238 (10th Cir. 1948) (general motion to dismiss properly raised issue of statute of limitations.)

They cite *Sostre* v. *Rockefeller*, 312 F. Supp. 863, 884 (SDNY 1970) (Motley, J.) *rev'd. in part, modified in part, aff'd. in part*, 442 F.2d 178, *cert. denied*, 404 U.S. 1049,[8] and *Henry* v. *Greenville Airport Commission*, 284 F.2d 631 (4th Cir., 1960).[9] This proposition is clearly inappropriate, however, since here, unlike the above-cited cases, no determination was made on the merits of petitioners' claims. (Petitioners' Appendix, p. A-14; Mr. Justice Marshall's ruling denying injunction pending appeal, (A. p. 5a).

Secondly, and of even greater importance are the well-known principles applied by the United States Supreme Court in *Socialist Labor Party* v. *Rhodes, supra*, and *Reynolds* v. *Sims, supra*. In the latter, as previously noted, it was specifically held that in dealing with an imminent election and complicated election laws, a Court "should act and rely upon general equitable principles. . . ." 377 U.S. at 585, *supra*.

C.

DECLARATORY JUDGMENT PROPERLY DENIED.

Much is made by the petitioners of the argument that even assuming injunctive relief was properly denied, a declaratory judgment should, nevertheless, have been granted. Great reliance is placed upon such decisions as *Steffel* v. *Thompson*, 415 U.S. 452 (1974). In that case it is true that declaratory relief was found appropriate, notwithstanding

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[8]Because of the reversal by the Court of Appeals of many of the broad orders for injunctive relief that had been issued by the District Court in the *Sostre* case, we feel that it is inaccurate to state that the District Court's decision had been reversed in part only "[o]n other grnds" as claimed by the petitioners. (Petition, p. 13).

[9]It should be further noted that the context of this case involved a finding by the District Court that blacks had been discriminated against. However, the court had also denied a preliminary injunction on the basis of lack of irreparable injury as well as the fact that an order would not maintain the status quo, but would instead change it. It was this reasoning which the Court of Appeals in its reversal had held to be an inadequate basis for denying relief.

the fact that an injunction was not warranted. However, that action involved a challenge to a state criminal statute where no state court proceedings were pending at the time. The only equitable requirement that was relaxed was that of demonstrating irreparable injury. Because this factor could not be shown, an injunction was held to have been properly denied. However, in permitting declaratory relief, the Court was careful to emphasize that there were no pending criminal proceedings, stating:

> "When no state proceeding is pending *and thus considerations of equity, comity, and federalism have little vitality,* the propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief. . . ." (Emphasis added.)

Id. at 463.

The Court went at great lengths to reaffirm the doctrine in *Samuels* v. *Mackell*, 401 U.S. 66 (1971) that the same principles of equity, comity and federalism

> ". . . ordinarily would be flouted by issuance of a federal declaratory judgment when a state proceeding was pending, *since the intrusive effect of declaratory relief 'will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid.'* 401 U.S. at 72, 91 S. Ct., at 767. We therefore held in Samuels that, 'in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory

> judgment . . .' Id., at 73, 91 S. Ct., at 768." (Emphasis added.)

Id. at 462.

It is respectfully submitted that comparable principles of equitable jurisdiction and federalism which caution against disrupting a pending state court proceeding would also apply in the present situation. The same chaotic effect upon a state's electoral process in the face of impending election deadlines would obviously result even if the relief were labelled as only "declaratory." It is clear that a declaratory judgment could easily have a *res judicata* effect on the election laws in question. Secondly, a declaratory judgment or decree could be enforced by "further necessary or proper relief" pursuant to 28 U.S.C., § 2202. Both of these factors were noted by the Court in *Steffel, id.*, at 462, n. 11. These considerations were underscored by the subsequent decision in *Hicks* v. *Miranda*, —— U.S. ——, 95 S. Ct. 2281 at 2292 (1975), in which this Court declined to permit declaratory relief in respect to pending state criminal proceedings for these reasons.

Had a declaratory judgment been granted as demanded in the Complaint, the petitioners in all probability would have been the first to insist that the State petition laws had thus been invalidated for this year's election. It would then have been claimed that the Secretary of the State was obligated to process the unfiled petition pages on short notice, with no opportunity to prepare administratively beforehand. It was this burden that the petitioners had sought to thrust upon the respondent, Secretary of the State, throughout this litigation. In the alternative, they also had demanded that the Communist Party candidates be peremptorily placed on the ballot, without any further showing of support as required by state law. Had declaratory "relief" been granted, this argument would have undoubtedly been made with even greater outcry. It is evident, therefore, that the peti-

tioners pleas for declaratory relief rely on matters of label and form and not of substance. The Court, therefore, properly exercised its discretion in withholding a declaratory "remedy" as well as an injunctive decree itself.

CONCLUSION

It is clear that there are no special and important reasons for granting a writ of certiorari in this case, a writ which, of course, is not a matter of right but of sound judicial discretion. The decision by the District Court and its affirmance by the United States Court of Appeals for the Second Circuit are fully consistent with applicable rulings of this Court, including *Socialist Labor Party* v. *Rhodes, supra,* and *Reynolds* v. *Sims, supra.* There is absolutely no showing that the lower courts have departed from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision, within the meaning of Rule 19, Revised Rules of the Supreme Court.

It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit in this case is completely without merit and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Barney Lapp, Attorney for the Respondent, Gloria Schaffer, Secretary of the State, State of Connecticut, certify that on the 10th day of December, 1976, I served a copy of the foregoing Brief by mailing, United States Mail, Postage Prepaid, to the following attorneys of record:

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APPENDIX

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SUPREME COURT OF THE UNITED STATES

No. A–257

Joelle Fishman et al.
v.
Gloria Schaffer, Secretary of State of Connecticut, et al.
} Application for Injunction.

[October 1, 1976]

MR. JUSTICE MARSHALL, Circuit Justice.

This is an application to me as Circuit Justice for an injunction ordering officials of the State of Connecticut to place on the ballot for the November 2 election the names of the Communist Party candidates for President and Vice President of the United States, Gus Hall and Jarvis Tyner, respectively. Applicants[1] sought relief without success from a three-judge District Court for the District of Connecticut and, on appeal, from the Court of Appeals for the Second Circuit.[2] While there is no question of my power to grant such relief, Supreme Court Rule 51, *McCarthy* v. *Briscoe* (opinion of POWELL, J., in-Chambers, September 30, 1976), *Williams* v. *Rhodes*, 89 S. Ct. 1, 21 L. Ed. 2d 69 (opinion of STEWART, J., in-Chambers, 1968), it is equally clear that "such power should be used sparingly and only in the most critical and exigent circumstances." *Williams* v. *Rhodes, supra*, 89 S. Ct. at —, 21 L. Ed. 2d, at 70. Since this case does not meet that standard, I must deny the requested relief.

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[1] Applicants are two petition circulators (Fishman and Gagyi) and the Presidential and Vice Presidential candidates of the Communist Party (Hall and Tyner), for whose candidacy Fishman and Gagyi circulated petitions.

[2] In view of the District Court's denial of relief on equitable grounds without deciding the merits of the constitutional attack, plaintiffs properly sought review initially in the Court of Appeals. See *McCarthy* v. *Briscoe, supra*, n. 2; *MTM, Inc.* v. *Baxley*, 420 U. S. 799, 804 (1975).

Plaintiffs filed their complaint on July 2, 1976, attacking as unconstitutionally burdensome certain provisions of the Connecticut election law which apply to candidates seeking to get on the ballot by means of nominating petitions. They sought declaratory and injunctive relief against enforcement of only a small segment of this procedure—the prescribed method for filing the completed petitions. Conn. Gen. Stat. § 9-453.

In order to demonstrate a "significant modicum of support" *Jenness* v. *Fortson*, 403 U. S. 431, 432 (1971), Connecticut requires potential candidates to submit petitions signed by electors equal to one percent of the number who voted for the same office in the previous election. Conn. Gen. Stat. § 9-453d. The petitions are available immediately after the last state-wide election and do not have to be filed until nine weeks before the relevant election. Conn. Gen. Stat. § 9-453n. Thus, the numerosity and time requirements of the statute are, as the District Court observed, "markedly more favorable" to the potential candidate than are constitutionally required. District Court Slip op., at 3; see *Storer* v. *Brown*, 415 U. S. 724 (1974); *American Party of Texas* v. *White*, 415 U. S. 767 (1974); *Jenness* v. *Fortson*, 403 U. S. 431 (1971); Note, Developments in the Law-Elections, 88 Harv. L. Rev. 1111, 1123-1130 (1975).

As a means of assuring the authenticity of the signatures collected, the law requires that the circulator sign a statement under penalty of perjury that (1) each signer of a petition signed the petition in his or her presence, and (2) he or she either knows the signer, or the signer satisfactorily identified himself or herself to the circulator. This procedure must be performed personally before the Town Clerk in each town where any petition signer resides. Plaintiffs do not object to the need for the circulator to make the required statement. They claim, however, that the requirement that it be done personally in front of numerous Town Clerks necessitates so much travel that it is unconstitutionally

burdensome.[3] While acknowledging that the state has a valid and important interest in assuring the authenticity of the signatures and the eligibility of the signers, plaintiffs argue that this interest can be served in ways less burdensome to the circulators.

The District Court, while sympathetic to this claim, did not rule on the merits, since it found plaintiffs' suit barred by laches. It noted that plaintiffs had tried and failed to qualify for a position on the ballot in a previous election. They were familiar with the statute and could have brought suit earlier. The delay meant that the legislature could not consider alternative filing requirements; instead, relief, if warranted, would have to be the drastic remedy of putting the candidates on the ballot, leaving the State with no protection of its interest in authenticity. Accordingly, the District Court dismissed the action. The Court of Appeals, in an expedited appeal, affirmed without opinion.

Turning to the merits of the application, as I noted previously, the relief sought is extraordinary. So far as I am aware, a single Justice of this Court has ordered a State to put a candidate's name on the ballot only twice. *Williams* v. *Rhodes, supra; McCarthy* v. *Briscoe, supra.* This case lacks all the significant features warranting relief in those cases.

McCarthy presented "no novel issue of constitutional law."

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[3] Specifically, they object to those portions of Conn. Gen. Stat. §§ 9-453i and 453k (1976 Supp.) which require that:

1. "Each page of a nominating petition shall be submitted *by the person who circulated the same to the town clerk of the town in which the signers reside* . . . ." § 9-453i (1976 Supp.).

2. "The town clerk shall not accept any page of a nominating petition *unless the circulator thereof signs in his presence the statement* as to the *authenticity* of the signatures thereon required by section 9-453j." § 9-453k (a) (1976 Supp.).

3. "The town clerk shall *certify* on each such page that the circulator thereof signed such statement in his presence and that either he knows the circulator or that the circulator satisfactorily identified himself to the town clerk." § 9-453k (b) (1976 Supp.).

Slip op., at 4. In MR. JUSTICE POWELL's view, the Texas Legislature had adopted an "incomprehensible policy," amending its Election Code so as to preclude independent candidates for the office of President from qualifying for the general election ballot. Slip op., at 5. This deliberate refusal to provide access to independents was characterized by both the District Court and MR. JUSTICE POWELL as demonstrating an "intransigent and discriminatory position." *Ibid.* Thus, there was no question that Texas had clearly violated the constitutional requirements for ballot access.

In contrast, the constitutionality of the Connecticut statute is at best a close question. I have no doubt about the correct standard of review:

> "Whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discrimination . . . their validity depends upon whether they are necessary to further compelling state interests.
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> . . . . .
>
> [The limitations must be] reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." *American Party of Texas*, v. *White*, *supra*, 415 U. S., at 780–781.

Nevertheless, there is little precedent dealing specifically with filing procedures. Indeed, the one case touching on the subject, *American Party of Texas* v. *White*, *supra*, suggests that a requirement more burdensome than Connecticut's—that all signatures be notarized at the time they are collected—is not unconstitutional, at least absent more proof of impracticability or unusual burdensomeness than was before the Court. *Id.*, at 787. Moreover, unlike the Texas law in *McCarthy* which provided no means of access whatever for an independent candidate, and the Ohio law which made it "virtually impossible" for a new political party to get on the ballot, *Williams* v. *Rhodes*, *supra*, 393 U. S., at 25, Connecticut has one of the more liberal ballot access statutes. Far from the

intransigence found in *McCarthy*, here the Connecticut Legislature apparently sought to deal rationally with abuses it had encountered in the petitioning process. See Connecticut General Assembly 1957. House Proceedings Volume 7, Part 4, pp. 2313–2314.

Furthermore, while there may be less burdensome ways to authenticate signatures, the fact remains that a number of groups have successfully used the Connecticut procedures. Since 1968, four petitioning parties have qualified on a statewide basis under the same procedures now attacked. Affidavit of Henry Cohn, Elections Attorney and Director of the Elections Division of the Secretary of State's Office, August 2, 1976. In addition, according to Mr. Cohn's later affidavit, as of September 17, 1976, it appeared that the U. S. Labor Party would qualify Presidential candidates this year. In view of this record showing that it is feasible to comply with the requirement under attack, plaintiffs' claims that the statute is unduly onerous become less compelling. See *American Party of Texas* v. *White*, *supra*, 415 U. S., at 779, 783–784. While I do not intimate that plaintiffs may not ultimately prevail on the merits,[4] I do conclude that unlike *McCarthy*, the question is too novel and uncertain to warrant a single Justice's acting unilaterally to strip the State of its chosen method of protecting its interests in the authenticity of petition signatures.

In addition to these distinctions on the merits, there are several additional factors militating against the extraordinary relief sought. First, the plaintiffs delayed unnecessarily in commencing this suit. The statute is not a new enactment and plaintiffs have, in fact, utilized it before. In 1972, the Communist Party unsuccessfully circulated petitions for pres-

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[4] I imply no view on the correctness of the dismissal of the action insofar as it seeks declaratory relief. Moreover, I note that that claim will not be rendered moot by the occurrence of the election or by our refusal to grant affirmative relief now. *American Party of Texas* v. *White*, *supra*, 415 U. S. at 770, n. 1; *Storer* v. *Brown*, 415 U. S. 724, 737, n. 8 (1974).

idential electors. And in 1974, Joelle Fishman, one of the plaintiffs-electors in this suit, successfully qualified as a petitioning candidate for Congress. Thus plaintiffs were sufficiently familiar with the statute's requirements and could have sued earlier. Moreover, defendants strongly oppose the relief sought, claiming that an injunction at this time would have a chaotic and disruptive effect upon the electoral process. Defendants' Response, at 1. The Presidential and Overseas Ballots have already been printed; some have been distributed. The general absentee ballots are currently being printed. *Id.*, at 2. This stands in marked contrast to the situation in *Williams* v. *Rhodes*, where Ohio agreed that the Independent Party could be placed on the ballot without disrupting the election. *Williams* v. *Rhodes*, *supra*, 21 L. Ed. 2d, at 70; *Williams* v. *Rhodes*, 393 U. S. 23, 35 (1968). It also differs from *McCarthy*, where it appears that Texas had neither printed nor distributed any ballots when the injunction was issued. Slip op., at 7 n. 4.

For these reasons, I conclude that the application should be denied.

It is so ordered.